

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JEFFREY THOMAS HARDIN, JR.,

No. 2:23-cv-1902 DAD AC P

Plaintiff,

v.

PATRICK COVELLO, et al.,

ORDER AND FINDINGS AND
RECOMMENDATIONS

Defendants.

Plaintiff is a state inmate who filed this civil rights action pursuant to 42 U.S.C. § 1983 without a lawyer. The original and first amended complaints were screened and found to not state any claims for relief. ECF Nos. 9, 16. Plaintiff was given a final opportunity to amend the complaint and has filed a second amended complaint. ECF No. 30. He has also filed motions for an extension of time (ECF No. 28), for leave to proceed in forma pauperis (ECF No. 29), and for appointment of counsel (ECF No. 31).

I. Motion for Leave to Proceed In Forma Pauperis

Plaintiff has filed a motion for leave to proceed in forma pauperis. ECF No. 29. However, he was previously granted such leave (ECF No. 9), and the instant request will be denied as unnecessary.

II. Motion for Extension of Time

Plaintiff has filed a motion for a sixty-day extension of time to file his amended

1 complaint. ECF No. 28. However, plaintiff had until April 28, 2025, to file his second amended
 2 complaint (ECF No. 27), and the complaint is dated April 27, 2025 (ECF No. 30 at 11). Since
 3 plaintiff is a prisoner proceeding pro se, he is afforded the benefit of the prison mailbox rule. See
 4 Houston v. Lack, 487 U.S. 266, 276 (1988) (establishing rule that a prisoner's court document is
 5 deemed filed on the date the prisoner delivered the document to prison officials for mailing). As
 6 a result, the amended complaint is timely and the motion for an extension of time will be denied
 7 as unnecessary.

8 III. Second Amended Complaint

9 A. Statutory Screening of Prisoner Complaints

10 The court is required to screen complaints brought by prisoners seeking relief against "a
 11 governmental entity or officer or employee of a governmental entity." 28 U.S.C. § 1915A(a). A
 12 claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke v.
 13 Williams, 490 U.S. 319, 325 (1989). The court may dismiss a claim as frivolous if it is based on
 14 an indisputably meritless legal theory or factual contentions that are baseless. Neitzke, 490 U.S.
 15 at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded, has an
 16 arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th Cir. 1989).

17 In order to avoid dismissal for failure to state a claim a complaint must contain more than
 18 "naked assertions," "labels and conclusions" or "a formulaic recitation of the elements of a cause
 19 of action." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-557 (2007). In other words,
 20 "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
 21 statements do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A claim upon which the
 22 court can grant relief has facial plausibility. Twombly, 550 U.S. at 570. "A claim has facial
 23 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
 24 inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. When
 25 considering whether a complaint states a claim, the court must accept the allegations as true,
 26 Erickson v. Pardus, 551 U.S. 89, 93-94 (2007), and construe the complaint in the light most
 27 favorable to the plaintiff, Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

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1 B. Factual Allegations of the Second Amended Complaint

2 The second amended complaint names nearly forty defendants from three prisons, a state
3 hospital, and a private medical practice, as well as an unspecified number of Doe defendants.
4 ECF No. 30 at 1-3. Plaintiff alleges that defendants have denied him treatment for a mite
5 infestation due to his sexual orientation. Id. at 6-8. He asserts that medical staff have regularly
6 denied him skin testing and referral to a dermatologist or entomologist, and while he has
7 occasionally been prescribed creams to treat the mites, they have been ineffective or not refilled.
8 Id. at 6. Instead of treating the condition, medical staff have written him off as delusional and
9 referred him to mental health. Id. 6-7.

10 C. Failure to State a Claim

11 Having conducted the screening required by 28 U.S.C. § 1915A, the court finds that the
12 complaint does not state a valid claim for relief pursuant to the Eighth or Fourteenth Amendments
13 against any defendant. Once again, plaintiff fails to allege any facts to support the conclusory
14 claim that he is being denied medical treatment due to his sexual orientation. With respect to the
15 deliberate indifference claims, plaintiff fails to make allegations against over a dozen of the
16 named defendants, and for numerous other defendants he makes only conclusory allegations that
17 between 2020 and 2023 they denied him medical attention and claimed his condition was caused
18 by mental health issues or substance abuse problems. See ECF No. 30 at 8 (making general
19 allegations against various defendants); Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir.
20 1998) (“Liability under § 1983 must be based on the personal involvement of the defendant.”)
21 (citing May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980))). While plaintiff does make some
22 specific allegations against a handful of defendants, they consist of allegations that defendants
23 refused to send his “skin tapings” to the lab, referred him to mental health instead of an
24 entomologist, and said the substance coming off his skin was dandruff. ECF No. 30 at 7.
25 However, a misdiagnosis or difference of opinion as to the proper treatment for plaintiff’s
26 condition is not sufficient to state a claim for relief. See Wilhelm v. Rotman, 680 F.3d 1113,
27 1123 (9th Cir. 2012) (negligent misdiagnosis did not constitute deliberate indifference); Toguchi
28 v. Chung, 391 F.3d 1051, 1058 (9th Cir. 2004) (difference of opinion about proper course of

1 treatment is not deliberate indifference).

2 D. No Leave to Amend

3 Leave to amend should be granted if it appears possible that the defects in the complaint
4 could be corrected, especially if a plaintiff is pro se. Lopez v. Smith, 203 F.3d 1122, 1130-31
5 (9th Cir. 2000) (en banc). However, if, after careful consideration, it is clear that a complaint
6 cannot be cured by amendment, the court may dismiss without leave to amend. Cato v. United
7 States, 70 F.3d 1103, 1105-06 (9th Cir. 1995).

8 The undersigned finds that, as set forth above, the second amended complaint fails to state
9 a claim upon which relief may be granted. Plaintiff has already been given two opportunities to
10 amend the complaint and advised what kind of information he needed to provide. Given the lack
11 of additional facts provided by plaintiff and his continued failure to make any specific factual
12 allegations against defendants, it does not appear that further amendment would result in a
13 cognizable claim. As a result, leave to amend would be futile and the complaint should be
14 dismissed without leave to amend.

15 IV. Motion for Appointment of Counsel

16 Plaintiff requests appointment of counsel on the ground that he requires an attorney to go
17 to trial. However, district courts lack authority to require counsel to represent indigent prisoners
18 in § 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In certain
19 exceptional circumstances, the district court may request the voluntary assistance of counsel
20 pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991);
21 Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). “When determining whether
22 ‘exceptional circumstances’ exist, a court must consider ‘the likelihood of success on the merits
23 as well as the ability of the [plaintiff] to articulate his claims *pro se* in light of the complexity of
24 the legal issues involved.’” Palmer v. Valdez, 560 F.3d 965, 970 (9th Cir. 2009) (quoting
25 Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983)).

26 In light of the recommendation that the amended complaint be dismissed without leave to
27 amend, the court cannot find that the necessary exceptional circumstances exist to warrant the
28 appointment of counsel and the motion will be denied.

V. Plain Language Summary of this Order for Party Proceeding Without a Lawyer

2 It is being recommended that your complaint be dismissed without leave to amend
3 because you have failed to allege what each defendant did to violate your rights and made only
4 general allegations that defendants refused to provide you with medical care. In the few instances
5 where you made specific allegations, you have shown only a difference in opinion as to proper
6 treatment, which is not enough to state a claim.

CONCLUSION

8 In accordance with the above, IT IS HEREBY ORDERED that:

9 1. Plaintiff's motions for an extension of time (ECF No. 28) and for leave to proceed in
10 forma pauperis (ECF No. 29) are DENIED as unnecessary; and
11 2. Plaintiff's motion for appointment of counsel (ECF No. 31) is DENIED.

12 IT IS FURTHER RECOMMENDED that the second amended complaint be dismissed
13 without leave to amend for failure to state a claim.

14 These findings and recommendations are submitted to the United States District Judge
15 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
16 after being served with these findings and recommendations, plaintiff may file written objections
17 with the court. Such a document should be captioned “Objections to Magistrate Judges Findings
18 and Recommendations.” Plaintiff is advised that failure to file objections within the specified
19 time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153
20 (9th Cir. 1991).

21 || DATED: June 5, 2025

Allison Claire
ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE